BEFORE THE

SURFACE TRANSPORTATION BOARD

Sec. 5A Application No. 118 (Sub-No. 2), et al.,
EC-MAC MOTOR CARRIERS SERVICE ASSOCIATION, INC., ET AL.
(and Embraced Dockets)

REPLY OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. TO RATE BUREAU PETITIONS FOR RECONSIDERATION

The motor carrier rate bureaus find nothing to like in the Board's Decision served November 20, 2001 in this proceeding, and they criticize that decision on numerous legal and policy grounds. Their arguments are meritless. Accordingly, National Small Shipments Traffic Conference, Inc. ("NASSTRAC") urges the board to deny the rate bureaus' reconsideration petitions.

I. THE RATE BUREAUS HAVE LITTLE TO COMPLAIN ABOUT

Before addressing the specific complaints of the rate bureaus, NASSTRAC would remind the Board of several basic facts about this proceeding.

First, it involves antitrust immunity for competitors, which is rare and disfavored. In being allowed to retain their antitrust immunity, the rate bureaus enjoy a privilege denied to most businesses.

Second, the activity at issue here -- maintaining bureau class rates and raising them at least once a year through general rate increases -- is price fixing, a per se violation of the antitrust laws.

Third, motor carrier ratemaking based on class rate tariffs coupled with discounting led to the undercharge epidemic, and abusive litigation against thousands of shippers, large and small. Most undercharge defendants were innocent of any wrongdoing, but they paid millions of dollars to bankruptcy estates and collection personnel to settle baseless claims for full undiscounted class rates. Many collection cases and at least one collection campaign (Humboldt's) involved late-pay penalty claims based on class rates.

Fourth, whenever the ICC or STB considered whether full undiscounted class rates were reasonable in the course of proceedings arising out of the undercharge epidemic, those rates were found to be unreasonable.

Fifth, undiscounted class rates today are higher than the undiscounted class rates found unreasonable in the undercharge cases, due to GRIs in recent years.

Sixth, nothing in the Board's Decision will prevent rate bureaus from continuing to price their services based on class rates, with or without discounts. Shippers that lack the knowledge, leverage or opportunity to negotiate discounts may legally be quoted and charged undiscounted class rates, and their only remedy will be to challenge the reasonableness of those collectively set rates in a proceeding before the Board.

Seventh, nothing in the Board's Decision will prevent further increases in undiscounted bureau class rates through GRIs. Rates paid by shippers charged undiscounted class rates will automatically increase by the percentage amount of the GRI. Rates paid by shippers that have negotiated discounts will also automatically increase by the per-

centage amount of the GRI, unless and until the shippers learn of the GRI and negotiate with their carriers for a waiver or reduction of he increase.

These facts are conspicuously absent from the rate bureaus' petitions for review. The rate bureaus have actually been allowed to preserve not just their antitrust immunity, but also most features of a highly questionable status quo. It is against this background that their complaints about the Board's decision must be assessed.

NASSTRAC has acknowledged that there can be pro-competitive aspects of motor carrier ratemaking based on discounts off class rates, especially in today's environment of widespread contracting. In particular, this process may facilitate comparison of individual carrier discount rate quotations, although, as the Board has pointed out, "[i]f the industry simply needed a baseline, and was not using collective ratemaking as a way to increase revenues from more vulnerable shippers, carriers would have no motivation for GRIs." See the Board's December 18, 1998 decision in this proceeding, at 6.

However, the fact that NASSTRAC did not call for more extensive reform of the rate bureaus, including conditions requiring reductions in class rates, does not mean that NASSTRAC regards the rate bureaus as national treasures. To the extent that rate bureaus' operations are pro-competitive or useful, it may make sense to preserve their antitrust immunity; to the extent that their operations result in shippers paying unreasonably high rates involuntarily or unwittingly, the imposition of conditions under 49 U.S.C. § 13703 must be considered.

In its November 20 Decision, the Board imposed two relatively mild conditions on the rate bureaus. Their members must disclose the existence and extent of discounting ("truth-in-rates"), and their members must not base late-pay penalties on full undis-

counted bureau class rates. In their petitions for reconsideration, the rate bureaus protest vigorously against these two conditions. Their criticisms do not warrant reconsideration.

II. THE RATE BUREAUS' POLICY ARGUMENTS AGAINST TRUTH-IN-RATES SHOULD BE REJECTED

EC-MAC, et al. and Middlewest Motor Freight Bureau, Inc. and Pacific Inland Tariff Bureau, Inc. ("MMFB, et al.") deny that there is any problem. According to them, no shippers pay undiscounted class rates, or at least not bureau undiscounted class rates. See, e.g., EC-MAC, et al. Petition at 6: "For decades, motor carrier pricing has been highly competitive and characterized by widespread discounting."

However, widespread discounting is not the same as universal discounting. See, in this regard, the ICC's decision served May 12, 1995 in Docket No. 40751, Dillard Department Stores, Inc. -- Petition for Declaratory Order -- Certain Rates and Practices of PIE Nationwide (Fidelcor Business Credit Corporation, Accounts Receivable, Successor in Interest). At page 6 of that decision, the Commission observed: "Further, Fidelcor submits that as much as 10 or 20 percent of PIE's LTL general commodity freight in 1989 and 1990 moved at full, undiscounted class rates." See also Georgia-Pacific Corp. -- Petition for Declaratory Order, 9 I.C.C. 2d 103 (1992), aff'd sub nom Oneida Motor Freight, Inc. v. ICC, 45 F.3d 503 (D.C. Cir. 1995):

> In due course, various "corrected" freight bills were delivered to Georgia-Pacific, and payment for alleged undercharges in ever increasing amounts was demanded. Most of the corrections were based on either Middle Atlantic Conference class rates or, in a few instances, New England Motor Freight Bureau class rates.

9. I.C.C. 2d at 109, footnote omitted.

Several rate bureaus have adopted discount programs for shippers with no other discount program. NASSTRAC supports such programs, but they do not go far enough to insure that no shipper ever pays unreasonably high collectively-set rates.

It is not clear that all rate bureaus have such programs. In addition, they are not required, and could be rescinded. They are also not automatic minimum discounts. The SMC program appears to come close, since SMC's analysis indicated that there are no rates charged by SMC members that reflect less than a 20% discount. EC-MAC, et al. and MMFB, et al., in contrast, either did not perform, or did not disclose, any analysis of their members' pricing, and they both insist that any negotiated discount, no matter how small, should supersede the 35% discounts available to shippers with no other discount program.

The Board was therefore clearly correct when it denied earlier rate bureau petitions for reconsideration on this very point. See the decision served February 11, 2000, which the rate bureaus have not appealed.

The rate bureaus go on to argue that even if there were a problem, the Board's truth-in-rates approach is unnecessary (because all shippers already know about discounting) and excessively burdensome (because notice of discounting can be provided more easily than in the manner called for by the Board). In short, the rate bureaus argue that if the Board does not simply abandon reform and preserve the status quo, it should require no more than that rate bureaus disclose the existence (but not the extent) of discounting, and provide such disclosure sparingly, if at all.

The problem with concealing the range of discounting is that it also conceals the fact that undiscounted class rates are so extraordinarily high that no one should ever pay them, or even rates approaching full class rates. Shippers that are unfamiliar with motor carrier ratemaking will be less likely to be taken advantage of if told that discounts may exceed 70% than if merely told that "there are discounts generally available," as EC-MAC, et al. propose (Petition for Reconsideration at 17). Discounts are generally available off full coach airfares too, but consumers do not expect (as truck shippers should) that they will never have to pay full fare. And shippers would be even better served by notice that the range of discounts is from 20% or 35% to 70%, as NASSTRAC has suggested, than by notice that discounts range from 0% to 70%.

The rate bureaus express concern that full disclosure will lead to unrealistic expectations. But shippers aware of discounting are also likely to be aware of the factors that affect the level of discounts, including competition. The main focus of this proceeding is the more vulnerable shippers, and they are more likely to have expectations that are unreasonably low without notice, than to have expectations that are unreasonably high with notice. In any event, the suggestion that the public interest would be disserved by truth-in-rates is hard to credit.

Nor does the claim of discrimination against bureau members make sense. Shippers should appreciate being educated about discounts, and may thereby learn to ask non-bureau carriers about their discounts. If the latter try to charge full class rates or minimally discounted class rates, bureau members will be the carriers getting shippers' business.

As for how, and how often, the notice is delivered, NASSTRAC believes the Board should err on the side of more rather than less notice. Effectiveness is the key. EC-MAC, et al. argue that notice (limited to stating that discounts are generally available) should be given only to new customers. In other words, if a shipper has ever been served by a carrier (even if that was 5 years ago on an isolated shipment), truth-in-rates should be inapplicable.

MMFB, et al. make the extraordinary suggestion that if the notice requirement is not dropped entirely, notice of the availability of (unspecified) discounts should "be limited to those instances where the carrier quotes or otherwise identifies the applicable rate as an undiscounted bureau class rate." Petition for Reconsideration at 11. Presumably, MMFB's goal is to discourage carriers from quoting undiscounted class rates, since they would then (but only then) have to disclose the existence of discounting. But nothing would discourage carriers from quoting rates based on 95% of 99% of bureau class rates to unsuspecting or vulnerable shippers.

There may be less onerous ways of supplying effective notice of discounting than the Board has called for. But the Board's approach is superior to those proposed by the rate bureaus in their petitions for reconsideration.

III. LATE-PAY PENALTIES BASED ON BUREAU CLASS RATES SHOULD BE PROHIBITED

The rate bureaus do not attempt to justify late-pay loss of discount penalties based on bureau class rates, and do not deny that such penalty provisions are common. It would be difficult if not impossible to defend such penalties as reasonable. Given the size of average discounts these days, such penalties can lead increases of 100%-200% or more in

the originally billed freight rates, merely because payment was one day late and a past due notice was sent.

This was the lesson of the collection campaign involving Humboldt Express, Inc. in the late 1990s. Both the applicable regulations (currently at 49 C.F.R. Part 377) and the ICC's decision permitting loss of discount penalties require such penalties to be reasonable, and reasonably related to carrier collection costs. See Payment of Rates and Charges -- Penalty Charges for Nonpayment, 4 I.C.C. 2d 340 (1988). However, these requirements were of little help to shipper defendants in the Humboldt cases, because the Bankruptcy Court ignored the requirements and refused to refer issues or cases to the STB.

In their petitions for reconsideration, the rate bureaus nevertheless seek to preserve the status quo, and the right to collect penalties in the form of unreasonably high rates they have set collectively. Their argument should be rejected.

The argument that they had no notice of the issue is untenable. It was discussed in the opening comments filed April 11, 2000 by NASSTRAC (joined by the Health & Personal Care Distribution Conference, Inc.), to which the rate bureaus could and did reply.

The argument that jurisdiction over the credit rules has been transferred to the Federal Motor Carrier Safety Administration is less than compelling because FMCSA has no jurisdiction over rate bureaus. By the rate bureaus' reasoning, this issue should fall through a crack and be beyond anyone's reach. Addressing potential abuses of credit requirements through the use of collectively set bureau class rates is clearly subject to STB

jurisdiction, even if other abuses (such as non-bureau carriers' unreasonable penalties) might need to be raised before the FMCSA.[1]

The rate bureaus argue that their members' right of independent action is being infringed. However, 49 U.S.C. § 13703(a)(4) preserves independent action for a carrier charging "its own rates," and bureau class rates do not meet this description. Widespread reliance on identical penalties set collectively is also anticompetitive and should not be condoned by the Board even if the identical penalties were reasonable (and they are not).

It is suggested that bureau member certification of compliance is unnecessary, and that shippers would be adequately protected by bureau rules prohibiting late-pay penalties based on bureau class rates. NASSTRAC does not oppose such rules, but they are not sufficient. The Board is aware from past proceedings how often carriers have violated requirements in the federal regulations. Dillard Department Stores, supra, is just one example. Too many carriers still maintain late pay penalty provisions in their tariffs that provide for multiple penalties, such as loss of discount and a 25% surcharge and attorneys fees if the carrier goes to court, despite the ICC's warning that "[o]verlapping use of more than one method would be unreasonable and could unjustly enrich a carrier." Payment of Rates and Charges, supra, 4 I.C.C. 2d at 343. The Board's requirement of one-time certification of compliance is not particularly onerous -- it could be accomplished by checking a box on a form letter circulated by the rate bureau staff -- and should be preserved.

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[1] As noted above, Board conditions that require more reasonable conduct by bureau members may also have an indirect positive influence on conduct by non-bureau carriers.

IV. THE RATE BUREAUS' PROCEDURAL ARGUMENTS AGAINST TRUTH-IN-RATES ARE UNAVAILING

Finally, the rate bureaus argue that the Board's adoption of truth-in-rates violates APA notice requirements. This criticism, even if meritorious, could be quickly and easily remedied. If the Board were to allow one more round of comments, it is doubtful that the rate bureaus would have much to say beyond the points made in their petitions for reconsideration. However, the Board has not violated APA requirements.

The rate bureaus assume that this proceeding involved rulemaking. But the rate bureau decisions they cite are all old cases predating deregulation (or, in one instance, implementing new deregulatory statutory changes). Certainly, the Board is not promulgating or amending regulations in the CFR. Many of the APA decisions relied on by the rate bureaus are therefore inapposite. For example, in Kooritzky v. Reich, 17 F.3d 1509 (D.C. Cir. 1994), the court of appeals held that a final rule could not be a "logical outgrowth" of a proposed rule where "the interim final rule ... prohibited what the [proposed] rule had permitted." 17 F.3d at 1513. Here, the Board's November 20, 2001 Decision went the other way, permitting what the December 18, 1998 decision suggested might be prohibited, subject to reasonable disclosure requirements. If anyone could be heard to complain about lack of notice, it is shippers, not the rate bureaus.

NASSTRAC agrees with Halogenated Solvents Industry Alliance that truth-in-rates is a lesser included remedy that qualifies as a logical outgrowth of the Board's earlier decisions. Those decisions emphasize that the main concern here is vulnerable shippers, including those that lack knowledge, leverage and/or the opportunity to negotiate discounts off bureau class rates. The disclosure requirements of truth-in-rates are clearly

responsive to that concern, and if they fall short of the worst-case scenario for the rate bureaus, they should count themselves fortunate, not aggrieved.

NASSTRAC understands that HSIA and NITL will respond at greater length to the rate bureau APA arguments. NASSTRAC agrees with the other shipper groups on these issues.

V. CONCLUSION

For the foregoing reasons, the Board should deny the rate bureaus' petitions for reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of January, 2002, caused copies of the foregoing document to be served on all parties of record by first-class mail.

John M. Cutler, Jr.